INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	15

CITATIONS

Cases:

Atlantic Coast Line R. Co. v. *Agwilines, Inc.*, 195 F. 2d 459	12
Calmar S.S. Corp. v. *United States*, 345 U.S. 446	13, 14
Cosmopolitan Shipping Co. v. *McAllister*, 337 U.S. 783	8, 9
East River Co., In re, 266 U.S. 355	8
Gillespie v. *U.S. Steel Corp.*, 379 U.S. 148	14
Hanlon v. *Waterman Steamship Corp.*, 265 F. 2d 206, certiorari denied, 361 U.S. 822	12
Johnson v. *Emergency Fleet Corp.*, 280 U.S. 320	9
Lake Tankers Corp. v. *Henn*, 354 U.S. 147	8
Lindgren v. *United States*, 281 U.S. 38	14
Linstead v. *Chesapeake & Ohio Ry.*, 276 U.S. 28	15
Oskar Tiedemann and Company, Petition of, 289 F. 2d 237	4
Pershing Auto Rentals, Inc. v. *Gaffney*, 279 F. 2d 546	8

Cases—Continued Page
Powell v. *U.S. Cartridge Co.*, 339 U.S. 497 ... 12
Schnell v. *United States*, 166 F. 2d 479, certiorari denied, 334 U.S. 833 ... 11
Smith v. *United States*, 346 F. 2d 449, certiorari denied, 382 U.S. 878 ... 12
United States, In re Petition of the, 259 F. 2d 608 ... 12
Statutes:
Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* ... 15
Jones Act, 46 U.S.C. 688 ... 2, 6, 8, 14, 15
Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781 *et seq.* ... 2, 5, 7, 13
Section 1 ... 3
Section 2 ... 5, 6
Suits in Admiralty Act, 41 Stat. 525, as amended, 74 Stat. 912, 46 U.S.C. 741 *et seq.* .. 8, 12, 13, 14
Section 2 (prior to amendment) ... 7
Section 2 ... 7
Section 5 ... 2, 5, 6, 7, 14
46 U.S.C. 186 ... 12
Delaware Wrongful Death Act, 10 Del. Code Ann. § 3704(b) ... 6, 14
Miscellaneous:
46 C.F.R. 299.82 (1949) ... 11
Gilmore & Black, *The Law of Admiralty* (1957) ... 11
H. Rep. No. 523, 86th Cong., 1st Sess., pp. 2–3 ... 7
H. Rep. No. 1292, 81st Cong., 1st Sess., pp. 3–4 ... 10, 11
H. Rep. No. 2060, 80th Cong., 2d Sess., p. 5 ... 10
H.R. 4051, 81st Cong., 1st Sess ... 10
H.R. 4873, 80th Cong., 2d Sess ... 9

Miscellaneous—Continued

S. Rep. No. 1894, 86th Cong., 2d Sess., pp. 3–6 ..... Page 7
S. Rep. No. 1782, 81st Cong., 2d Sess., p. 4 .. 10
S. Rep. No. 2535, 81st Cong., 2d Sess., pp. 2–3 ..... 9, 10, 11



In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 842

JULIUS BLACK, ADMINISTRATOR OF THE ESTATE OF DAVID VICTOR BLACK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 960

RUTH ELIZABETH ALLEN, EXECUTRIX OF THE ESTATE OF WILLIAM C. ALLEN, ET AL., PETITIONERS

v.

MATHIASEN'S TANKER INDUSTRIES, INC., AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware is reported at 236 F. Supp. 895. The opinion of the court of appeals is reported at 367 F. 2d 505, and is printed as Appendix C to

the petition in No. 960 and in the Appendix to the petition in No. 842.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1966. The petition for a writ of certiorari in No. 842 was filed on December 8, 1966. The petition for a writ of certiorari in No. 960 was filed on January 10, 1967, the time within which to file such petition having been extended to January 11, 1967, by order of Mr. Justice Brennan. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the operating agent of a United States Navy tanker is an "agent" of the United States within the meaning of the exclusivity provision of the Suits in Admiralty Act (46 U.S.C. 745).

2. Whether a United States Navy tanker, carrying military cargo as directed by the Navy, but operated by a private contractor, is a "public vessel" under the Public Vessels Act (46 U.S.C. 781 *et seq.*).

3. Whether the estate of a seaman on such a vessel has a remedy against the United States under a State wrongful death statute, in addition to a remedy under the Jones Act (46 U.S.C. 688).

STATUTES INVOLVED

Section 5 of the Suits in Admiralty Act (46 U.S.C. 745) in part provides:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a rem-

> edy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel * * *.

Section 1 of the Public Vessels Act (46 U.S.C. 781) in part provides:

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States * * *.

STATEMENT

These cases arise out of a collision between the USNS *Mission San Francisco,* a tanker owned by the United States, and the SS *Elna II,* a privately owned vessel. The ships collided in the Delaware River on March 7, 1957; the *Mission San Francisco* was totally destroyed, with a loss of ten lives. The *Mission*

San Francisco was being operated for the United States by Mathiasen's Tanker Industries, Inc., under a cost plus fixed-fee contract with the Military Sea Transportation Service ("MSTS"), an agency of the United States Navy. Petitions for exoneration or limitation of liability were filed by the United States and Mathiasen's, but were denied on the ground that both were responsible for the accident. *Petition of Oskar Tiedemann and Company,* 289 F. 2d 237 (C.A. 3). The United States then conceded its liability to petitioners—crew members of the *Elna II* and the *Mission San Francisco,* or their estates.[1] The questions remaining are whether petitioners may also recover damages against Mathiasen's, and, if not, the proper basis for recovery against the United States.

Mathiasen's operated the *Mission San Francisco* under a standard form contract, entitled "Contract for Operation of U.S. Navy Tankers" (App. 64a–109a).[2] Under Article 1 of the contract, Mathiasen's undertook to "manage and conduct the business in connection with the operation of such tankers as may be furnished to it by the Government from time to time" (App. 66a). Article 1 goes on to require Mathiasen's to authorize the master of the vessel to receive directly and carry out orders and instructions of the Commander, MSTS, "as regards employment of the vessel and prosecution of voyages" (App. 66a–67a). The Commander, MSTS, is required by the

[1] Petitioner in No. 842 is the administrator of the estate of a member of the *Mission San Francisco* crew. Petitioners in No. 960 are members of both crews, or their estates.

[2] "App." refers to Appellants' Appendix in Nos. 15280/81, 15293/94, in the court below, which has been filed in this Court.

contract to issue "operation instructions" to Mathiasen's (App. 66a). Mathiasen's is required to "equip, fuel, supply, maintain, man, victual and navigate" the tankers (App. 69a). The government agrees to reimburse Mathiasen's for all its costs under the contract, to pay a fixed fee as the operator's profit, and to assume the risks of the voyages (App. 76a–86a). The officers and crew of the vessel are declared to be employees of Mathiasen's rather than the United States (App. 70a). The tankers are declared to be owned by the government and to be "public vessels * * * employed solely in the public use or in the protection of the National interest or economy" (App. 67a).

At the time of the collision, the *Mission San Francisco* had most recently delivered and discharged a cargo of jet aviation fuel for the Navy and was proceeding in ballast to pick up further cargo as directed by the Navy.

After the liability of the United States to petitioners under the Public Vessels Act (46 U.S.C. 781 *et seq.*) was determined, the issue remained as to whether petitioners were entitled to recover against Mathiasen's. Petitioners sought to do so, because the Public Vessels Act (46 U.S.C. 782) does not permit pre-judgment interest, while such interest would be allowable against a private party such as Mathiasen's. The district court entered a decree against Mathiasen's which included such interest. 236 F. Supp. 895, 901–903, 910–911. The court of appeals, however, held that Section 5 of the Suits in Admiralty Act (46 U.S.C. 745)—which renders the liability of the United

245-819—67——2

States under that Act and the Public Vessels Act[3] exclusive of the liability of its "agent"—precluded any judgment against Mathiasen's.

Alternatively, petitioners in No. 960 contended that the district court erred in entering judgments against the United States under the Public Vessels Act rather than the Suits in Admiralty Act. Again, the crux of the matter is the obtaining of pre-judgment interest, since the Suits in Admiralty Act (46 U.S.C. 745) allows interest from when the claim is filed, while the Public Vessels Act (46 U.S.C. 782) allows interest only from the date of judgment. As to this contention, the court of appeals held that the *Mission San Francisco* was a "public vessel of the United States" within the coverage of the Public Vessels Act, and that that statute governed recovery against the United States.

Finally, petitioner in No. 842 sought to preserve the recoveries he obtained in the district court under both the Delaware Wrongful Death Act (10 Del. Code Ann. § 3704(b)), and the Jones Act (46 U.S.C. 688). On this point, the court of appeals held that the Jones Act recovery against the United States precluded further recovery under a State wrongful death statute.

ARGUMENT

1. Both petitions present the question of whether seamen injured by a vessel owned by the United States, operated for it, and subject to its operational control through a standard contractual agreement

[3] The Public Vessels Act incorporates the Suits in Admiralty Act, with the exception of the pre-judgment interest provision (46 U.S.C. 782).

with an operating agent, have a remedy only against the United States, or whether in addition they have a remedy against the operating agent itself. The rights of the seamen or their estates to recover damages are not affected by this issue, for the United States is clearly subject to direct liability for anything the agent did or failed to do in connection with the operation of the vessel, and has in fact conceded liability to petitioners (see *supra,* p. 4). The only practical consequence of that question here is the collection of pre-judgment interest, which may not be awarded against the United States under the Public Vessels Act. This problem is not likely to arise in the future, since, subsequent to 1960, actions involving public vessels may be brought against the United States under the Suits in Admiralty Act, which permits the awarding of interest from the date of the claim (46 U.S.C. 745).[4]

[4] As originally enacted, the Suits in Admiralty Act was limited to government vessels "employed as * * * merchant vessel[s]" and tugboats (46 U.S.C. 742 (1958 ed.)). Public vessels were separately covered in the Public Vessels Act (46 U.S.C. 781 *et seq.*). Because of uncertainty engendered by the public vessel-merchant vessel distinction (see H. Rep. No. 523, 86th Cong., 1st Sess., pp. 2–3; S. Rep. No. 1894, 86th Cong., 2d Sess., pp. 3–6), Congress in 1960 amended Section 2 of the Suits in Admiralty Act to delete the provision limiting jurisdiction to merchant vessels and tugboats. 74 Stat. 912, amending 41 Stat. 525. The amendment, however, applies only to suits brought after September 13, 1960; the present claims were filed in 1957.

Of course, the question of interest between the date of the accident and the date of the filing of the claim may still arise, since the Suits in Admiralty Act allows interest only from the date of the claim (46 U.S.C. 745). However, the amount involved in such situations is not likely to be large, for the suit

a. As the court of appeals observed, Mathiasen's was obviously an "agent" of the United States in the traditional sense of the word, since it was operating the vessel on behalf of and for the benefit of the government, and subject to the government's instructions. The question here presented is whether the exclusivity provision of the Suits in Admiralty Act uses the term "agent" in a special, limited sense.

Petitioners argue that the term "agent", as used in the statute, does not refer to an "operating agent" such as Mathiasen's, but only to a "general agent" of the type involved in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783 (*i.e.,* an agent "engaged to

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must be brought within two years of the accident. Moreover, a large proportion of a personal injury award typically involves losses accruing after the claim is filed (such as future loss of income). As to such items, interest from the date of the accident would obviously be inappropriate.

The issue raised by the petition may have a practical effect in other cases in two respects. First, the statute of limitations under the Suits in Admiralty Act is two years, while the Jones Act limitations period on actions is three years. Second, the seaman has no right to a jury trial under the Suits in Admiralty Act. As to the jury trial point, however, it should be noted that where there is a limitation proceeding and the claims exceed the limitation fund, all claims would have to be tried in the limitation proceedings if limitation is granted. *Pershing Auto Rentals, Inc.* v. *Gaffney*, 279 F. 2d 546 (C.A. 5); compare *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147. Such a trial would be in admiralty, without a jury, despite the Jones Act. *In re East River Co.*, 266 U.S. 355. On the other hand, if the petition for limitation were denied by the admiralty court—as it was here—the basic question of responsibility for the disaster would be settled by the judgment denying limitation, and only the issue of damages would remain for trial by jury.

No issue relating to statutes of limitations or trial by jury has been raised in the present cases.

take care of the shoreside business of the ship and who has no part in the actual management or navigation of the vessel" (337 U.S. at 796)). The argument is that the statute codified the *Cosmopolitan Shipping* decision, which held that the remedy against the United States as owner of a vessel is exclusive in a "general agent" situation. However, it is clear that the statute was also intended to codify *Johnson* v. *Emergency Fleet Corp.*, 280 U.S. 320, 322–323, 326–327, in which the remedy against the United States under the Suits of Admiralty Act was held exclusive in an "operating agent" situation.[5]

Thus, the legislative history shows that Congress did not intend the term "agent" as used in the statute to mean only the "general agent" involved in the *Cosmopolitan Shipping* decision.[6] This is further evidenced by the fact that the bill as originally introduced specified "a general agent under a general agent service agreement." H.R. 4873, 80th Cong., 2d Sess.;

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[5] See S. Rep. No. 2535, 81st Cong., 2d Sess., pp. 2–3, which states: "The first proviso declares the rule announced by the Supreme Court in *Cosmopolitan Shipping Co.* v. *McAllister* (337 U.S. 783), *Caldarola* v. *Eckert* (332 U.S. 155), and *Johnson* v. *Emergency Fleet Corp.* (280 U.S. 320), that the remedy under the Suits in Admiralty Act is exclusive."

[6] Even if the exclusivity provision were read to have incorporated only the *Cosmopolitan Shipping* case, petitioners' position would not be far advanced. Under that decision the requirement of suing the United States is not confined to the "general agent" situation. The broad test set forth in *Cosmopolitan Shipping* is on "whose enterprise * * * the vessel was" engaged (337 U.S. at 795). As the district court found (236 F. Supp. at 910–911) the *Mission San Francisco* was clearly engaged on an enterprise of the United States Government, since it had just delivered a cargo of jet fuel for the Navy and was proceeding to pick up further cargo.

see H. Rep. No. 2060, 80th Cong., 2d Sess., p. 5. As the bill was finally passed, only the comprehensive term "agent" was used, without limiting language. The distinction between general agents and operating agents had been explicitly made in letters from the Department of Justice reprinted in all of the committee reports. H. Rep. No. 2060, *supra,* at 4; H. Rep. No. 1292, 81st Cong., 1st Sess., pp. 3–4; S. Rep. No. 1782, 81st Cong., 2d Sess., p. 4; S. Rep. No. 2535, *supra,* at 3. Thus, the significance of the change from the specific term "general agent" to the more general term "agent" could not have escaped Congress.

b. The language quoted in the petition in No. 960 (pp. 11–12) from the statement of the Department of Justice regarding the proposed legislation clearly explains that the purpose of the bill to which the statement was addressed (H.R. 4051, 81st Cong., 1st Sess.) was to relieve litigants who had mistakenly sued the general agent. The statement further indicates the Department's view that under existing law the operating agent could be sued. However, the bill which was the subject of the statement contained no exclusivity provision, unlike the statute which was adopted. The Department's statement goes on to suggest that there be added to the bill a provision that the remedy against the United States was exclusive of any other action against any employee, agent or instrumentality "acting for or on behalf of the United States in the management *and operation* of its vessels." S. Rep. No. 2535, *supra,* at 4 (emphasis added). And while this language was not adopted, the present exclusivity provision (*supra,* pp. 2–3) was; and both committee

reports recommending the bill which was enacted observed that "it is believed that the language suggested by the Department of Justice in respect of the exclusive provision constitutes an immaterial variation in the language of the bill as drawn" (H. Rep. No. 1292, *supra,* at 3; S. Rep. No. 1782, *supra,* at 3).

As the petition in No. 960 points out (p. 11), the pertinent Senate Report stated that the bill would not change the existing rights of seamen to sue employers "who operate, under bare-boat charter or similar arrangements, vessels which are merely owned by the Government." S. Rep. No. 2535, *supra,* at 2. However, it is plain that the role of the government in the present case was far more than merely that of an owner who has given a bareboat charter, which is the equivalent of leasing a vessel.[7] As noted previously, the government here retained and actually exercised control over the operation and use of the *Mission San Francisco.*

[7] A bareboat charter, also called a demise, is similar to a lease. Under such an arrangement, the owner's principal obligation is merely to furnish a seaworthy vessel, while the charterer's principal obligation is to pay the hire and to return the vessel at the end of the term of the charter. Gilmore & Black, *The Law of Admiralty* § 4–20 *et seq.* (1957). After World War II, the Government bareboat chartered a number of surplus vessels for private operation. *Id.* at § 11–10. This was the situation to which the Senate Report referred. A charter form generally in use is set forth at 46 C.F.R. 299.82 (1949). Unlike the agreement involved in the present case, this form does not reserve to the government the right to issue operating instructions or to require the vessel to carry government cargo. Instead, the charterer is free to use the vessel for his own business. Under this form of charter, the operator of the vessel is not the government's agent. *Schnell* v. *United States,* 166 F. 2d 479 (C.A. 2), certiorari denied, 334 U.S. 833.

c. There is only one other appellate court decision in point, and, as petitioners concede (Pet. No. 842, p. 11; Pet. No. 960, p. 6), it is to the same effect as the decision below. *Smith* v. *United States,* 346 F. 2d 449 (C.A. 4), certiorari denied, 382 U.S. 878. In *Smith,* the Fourth Circuit construed the identical form of contract to confer on the operating agent an "agent" status for purposes of the exclusivity provision of the Suits in Admiralty Act. Both *Atlantic Coast Line R. Co.* v. *Agwilines, Inc.,* 195 F. 2d 459 (C.A. 5), and *Hanlon* v. *Waterman Steamship Corp.,* 265 F. 2d 206 (C.A. 2), certiorari denied, 361 U.S. 822, which are relied upon by petitioners, held that the exclusivity provision barred recovery against a general agent, but did not involve the question whether the statute applies to operating agents. *Powell* v. *U.S. Cartridge Co.,* 339 U.S. 497, involved different legislation (the Fair Labor Standards Act) and a different form of contract.

In addition, the prior decision of the Third Circuit in the present case, which decided that Mathiasen's was entitled to limitation, is also consistent with the decision below. *In re Petition of the United States,* 259 F. 2d 608 (C.A. 3). The pertinent statute accords the right of limitation to "[t]he charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement." 46 U.S.C. 186. There is no reason why an "agent" within the meaning of the Suits in Admiralty Act cannot meet this definition. Moreover, the determination of whether a party is entitled to petition for limitation is a preliminary matter, and is not intended

to be dispositive of the merits of a defense such as that here involved.

d. The question presented is also of limited potential scope. The Department of Navy advises that, as of December 31, 1966, there were only 20 tankers and 9 other vessels operated for the Navy by private shipping companies pursuant to contract with the MSTS, the civilian complement of the tankers ranging from 41 to 45 crew members and officers on the tankers, and from 40 to 89 crew members and officers on the other vessels.

2. Petitioners in No. 960 argue alternatively that the liability of the United States should have been predicated on the Suits in Admiralty Act, which permits pre-judgment interest, rather than the Public Vessels Act. As we have noted (see note 4, *supra*), this issue is a limited one, in that it relates only to suits brought before the 1960 amendment to the Suits in Admiralty Act, which eliminated the requirement that suits filed under that Act involve vessels "employed as a merchant vessel." 74 Stat. 912, amending 41 Stat. 525.

In any event, the decision below was clearly correct. As the court below pointed out, a ship owned by the United States and used as directed by the Navy for the transportation of military supplies would seem, on the face of it, to be a "public vessel". And this is consistent with *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, which held that a privately owned and privately operated vessel used as directed by the United States was "employed as a merchant vessel" so as to fall within the coverage of

the Suits in Admiralty Act. The *Calmar* opinion makes it plain that the basis for the decision was the fact of private ownership. This Court reasoned that the fact of private ownership precluded suits under the Public Vessels Act and thus rendered coverage under the Suits in Admiralty Act necessary, if the two statutes were to be construed as comprising a consistent whole (345 U.S. at 454–456).

3. Petitioner in No. 842 contends that he should have been permitted a recovery under the Delaware Wrongful Death Act (10 Del. Code Ann. § 3704(b)), as well as the recovery which he has obtained against the United States under the Jones Act. Since the liability of the United States is exclusive of "any other action by reason of the same subject matter" against Mathiasen's, under 46 U.S.C. 745 (*supra,* pp. 2–3), the contention must necessarily be that recovery under both the federal and State statutes is allowable against the United States. But such a dual recovery is plainly barred by *Gillespie* v. *U.S. Steel Corp.,* 379 U.S. 148, and *Lindgren* v. *United States,* 281 U.S. 38, holding that the Jones Act remedy is exclusive and, when available, prevents relief against the same defendant under a State wrongful death statute. We do not understand petitioner in No. 842 to contend that an award under the Delaware statute against the United States should be substituted for his Jones Act recovery.[8]

[8] If such a contention were made, it would have the effect of denying the seaman any Jones Act recovery (since a Jones Act recovery against the operating agent would be barred by the exclusivity provision of the Suits in Admiralty Act). And while recovery under the State statute would be advantageous

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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FEBRUARY 1967.

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to the petitioner in No. 842 (since greater in amount), in many cases, where the State statute contains a dollar limitation on wrongful death awards, the seaman's family would be in a better position under the Jones Act, which has no such limitation. Recovery against the United States as the Jones Act employer is supported by the rule under the Federal Employers' Liability Act (45 U.S.C. 51 *et seq.*, incorporated by reference into the Jones Act), that employees of an independent contractor engaged to perform an integral part of the business of operating a railroad, and subject to the railroad's operational control, may recover directly against the railroad as their FELA employer. *Linstead* v. *Chesapeake & Ohio Ry.*, 276 U.S. 28.

U.S. GOVERNMENT PRINTING OFFICE: 1967